ORIGINAL

NO. 05-7664

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
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REYMUNDO TOLEDO-FLORES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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QUESTION PRESENTED

Has the Fifth Circuit erred in holding - in opposition to the Second, Third, Sixth, and Ninth Circuits - that a state felony conviction for simple possession of a controlled substance is a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) and hence an "aggravated felony," under 8 U.S.C. § 1101(a)(43)(B), even though the same crime is a misdemeanor under federal law?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Citations iii

Prayer 1

Opinions Below 1

Jurisdiction 1

Statutory Provisions and Guidelines Involved 2

Statement of the Case 4

A. Course of Proceedings 4

B. Statement of Relevant Facts 5

Basis of Federal Jurisdiction 8

Reasons for Granting the Writ 9

This Court should grant certiorari to resolve the circuit split as to whether a state felony conviction for simple possession of a controlled substance is a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) and hence an "aggravated felony," under 8 U.S.C. § 1101(a)(43)(B), even though the same crime is a misdemeanor under federal law. 9

Conclusion 18

Appendix A: Opinion of the Court of Appeals in United States v. Toledo-Flores, No. 04-41378, 2005 WL 1995615 (5th Cir. Aug. 17, 2005) (unpublished) . . 19

Appendix B: Judgment of the District Court, United States v. Reymundo Toledo-Flores, No. 5:04CR00546-001 (S.D. Tex. Sept. 17, 2004) 21

TABLE OF CITATIONS

Page

CASES

Aguirre v. INS, 79 F.3d 315 (2d Cir. 1996) 11, 14-15

Cazarez-Gutierrez v. Ashcroft, 382 F.3d 905 (9th Cir. 2004) 12, 14-15, 17

Gerbier v. Holmes, 280 F.3d 297 (3d Cir. 2002) 12, 14-15, 17

Jenkins v. INS, 32 F.3d 11 (2d Cir. 1994) 11

Jerome v. United States, 318 U.S. 101 (1943) 10, 15-17

Leocal v. Ashcroft, 125 S. Ct. 377 (2004) 15

Matter of K-V-D-, Int. Dec. 3422, I. & N. Dec. 89 [1995 WL 582051] (BIA 1995) 14

Matter of L-G-, 21 I. & N. Dec. 89 [1995 WL 582051 (BIA 1995) 14

Matter of Yañez-Garcia, 23 I. & N. Dec. 390 [2002 WL 993589] (BIA 2002) 14

United States v. Briones-Mata, 116 F.3d 308 (8th Cir. 1997) 11

United States v. Cabrera-Sosa, 81 F.3d 998 (10th Cir.), cert. denied, 519 U.S. 885 (1996) 11

United States v. Graham, 169 F.3d 787 (3d Cir.), cert. denied, 528 U.S. 845 (1999) 12

United States v. Hernandez-Avalos, 251 F.3d 505 (5th Cir. 2001), cert. denied, 534 U.S. 935 (2001) 7, 11, 14-15

United States v. Hinojosa-Lopez, 130 F.3d 691 (5th Cir. 1997) 10-11

United Staces v. Ibarra-Galindo, 206 F.3d 1337 (9th Cir. 2000), cert. denied, 531 U.S. 1102 (2001) 14-15, 17

TABLE OF CITATIONS - (Cont'd)

Page

CASES - (Cont'd)

United States v. Palacios-Suarez, 418 F.3d 692 (6th Cir. 2005) 13, 15, 17

United States v. Pornes-Garcia, 171 F.3d 142 (2d Cir.), cert. denied, 528 U.S. 880 (1999) 14

United States v. Restrepo-Aguilar, 74 F.3d 361 (1st Cir. 1996) 11

United States v. Rivera, 265 F.3d 310 (5th Cir. 2001), cert. denied, 534 U.S. 1146 (2002) 11

United States v. Sanchez-Villalobos, 412 F.3d 572 (5th Cir. 2005) 7

United States v. Simon, 168 F.3d 1271 (11th Cir.), cert. denied, 528 U.S. 844 (1999) 11

United States v. Toledo-Flores, No. 04-41378, 2005 WL 1995615 (5th Cir. Aug. 17, 2005) (unpublished) . . . . . ii, 1, 5, 7

United States v. Turley, 352 U.S. 407 (1957) 16

United States v. Wilson, 316 F.3d 506 (4th Cir.), cert. denied, 123 S. Ct. 1959 (2003) 11

FEDERAL STATUTES AND RULES

8 U.S.C. § 1101(a)(43) 3, 9, 13

8 U.S.C. § 1101(a)(43)(B) . . . . . ii, 2, 9-10, 12-13

8 U.S.C. § 1325 . . . . . 4, 6

8 U.S.C. § 1326 8

18 U.S.C. § 16 15

18 U.S.C. § 3231 8

18 U.S.C. § 924(c) 2, 9, 11

18 U.S.C. § 924(c)(2) . . . . . ii, 2, 9-10, 13

TABLE OF CITATIONS - (Cont'd)

Page

FEDERAL STATUTES AND RULES - (Cont'd)

21 U.S.C. § 801. . . . . 2, 9, 11

21 U.S.C. § 802 9

21 U.S.C. § 844(a) 7

21 U.S.C. § 951 . . . . . 2, 9

28 U.S.C. § 1254(1) 1

46 U.S.C. App. 1901. . . . . 2, 9

Sup. Ct. R. 10(a) 15

STATE STATUTES AND RULES

Tex. Health and Safety Code Ann. § 481.102(3)(D) (Vernon 2001) 7

Tex. Health and Safety Code Ann. § 481.115 (Vernon 2001) 7

Tex. Penal Code Ann. § 12.35(a) 7

SENTENCING GUIDELINES

USSG § 2L1.2 2-3

USSG § 2L1.2, comment. (n.2) 3

USSG § 2L1.2(a) 2

USSG § 2L1.2(b) 2

USSG § 2L1.2(b)(1) 2

USSG § 2L1.2(b)(1)(C) 2-3, 6-7

PRAYER

The petitioner, Reymundo Toledo-Flores, respectfully prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on August 17, 2005.

OPINIONS BELOW

On August 17, 2005, the United States Court of Appeals for the Fifth Circuit issued its opinion affirming the judgment of the district court. See United States v. Toledo-Flores, No. 04-41378, 2005 WL 1995615 (5th Cir. Aug. 17, 2005) (unpublished). A copy of that opinion is attached as Appendix A.

The judgment of conviction and sentence of the district court is attached as Appendix B. The district court did not issue any written opinions.

JURISDICTION

On August 17, 2005, the United States Court of Appeals for the Fifth Circuit issued its judgment and opinion affirming the judgment of the district court. See United States v. Toledo-Flores, No. 04-41378, 2005 WL 1995615 (5th Cir. Aug. 17, 2005) (unpublished) (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND GUIDELINES INVOLVED

At issue in this petition is the portion of the definition of the term "aggravated felony" found in 8 U.S.C. § 1101(a)(43)(B):

> (43) The term "aggravated felony" means-
>
> . . .
>
> (B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);
>
> . . . .

8 U.S.C. § 1101(a)(43)(B).

In turn, 18 U.S.C. § 924(c) defines the term "drug trafficking crime" as "mean[ing] any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." 18 U.S.C. § 924(c)(2).

Also at issue in this petition is Section 2L1.2 of the United States Sentencing Guidelines, which provides:

> **§ 2L1.2. Unlawfully Entering or Remaining in the United States**
>
> (a) Base Offense Level: 8
>
> (b) Specific Offense Characteristic
>
> (1) Apply the Greatest:
>
> If the defendant previously was deported, or unlawfully remained in the United States, after --
>
> . . .
>
> (C) a conviction for an aggravated felony, increase by 8 levels;

. . .

USSG § 2L1.2.

The commentary to USSG § 2L1.2 provides in pertinent part that, "[f]or purposes of subsection (b)(1)(C), 'aggravated felony,' has the meaning given that term in 8 U.S.C. § 1101(a)(43) without regard to the date of conviction of the aggravated felony." USSG § 2L1.2, comment. (n.2).

STATEMENT OF THE CASE[1]

A. Course of Proceedings.

On March 16, 2004, a federal grand jury in the Laredo Division of the Southern District of Texas returned a one-count indictment charging the petitioner, Reymundo Toledo-Flores ("Mr. Toledo-Flores"), with felony illegal entry into the United States, in violation of 8 U.S.C. § 1325. (R 1: 7) The offense was alleged to have occurred "[o]n or about February 22, 2004." (R 1: 7)

On May 3, 2004, Mr. Toledo-Flores entered a plea of guilty to the indictment before United States District Judge George P. Kazen. (R 1: 11; R 2: 6)

On September 9, 2004, the district court sentenced Mr. Toledo-Flores to twenty-four months' imprisonment in the custody of the Federal Bureau of Prisons;[2] a one-year term of supervised release; and a mandatory special assessment of $100. The district court did not order a fine. (R 1: 17-22 [judgment]; R 3: 5-6 [transcript of oral pronouncement of sentence])

On September 16, 2004, Mr. Toledo-Flores filed a timely notice of appeal to the United States Court of Appeals for the Fifth

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[1] All references are to the record as it was constituted on appeal to the United States Court of Appeals for the Fifth Circuit. The Record on Appeal is cited as follows: (R [volume number]: [page number]). The Presentence Report ("PSR") is cited as follows: "PSR, ¶ [paragraph number]."

[2] This sentence was ordered to run consecutively to a six-month prison sentence imposed upon revocation of probation in another case, for a total prison sentence of thirty months. (R 3: 5) The revocation and six-month sentence are not at issue in this petition.

Circuit. (R 1: 23-24) On August 17, 2005, the United States Court of Appeals for the Fifth Circuit issued its judgment and opinion affirming the judgment of the district court. See United States v. Toledo-Flores, No. 04-41378, 2005 WL 1995615 (5th Cir. Aug. 17, 2005) (unpublished) (Appendix A).

B. Statement of Relevant Facts.

1. The Offense.

The prosecutor offered the following oral recitation of facts to supply the factual basis at Mr. Toledo-Flores's rearraignment/guilty plea proceeding:

> Judge, the defendant is a native and citizen of Mexico with no documents to enter or pass through or remain in the United States.
>
> The defendant was apprehended by the U.S. Border Patrol on the 23rd of February of near [sic] the Benitez County fence line near the 16-mile marker of I-35 north of Laredo, Texas.
>
> At the time he was arrested[,] the defendant admitted that he had last entered the United States illegally from Mexico by wading the Rio Grande River near the World Trade Bridge on the 22nd of February of 2004[,] and he waded the river and entered the United States at a place other than that designated by immigration officials as a port of entry.
>
> The defendant was last convicted of illegal entry on the 17th of November of 2000 in Del Rio, Texas.

(R 2: 14-15)

2. The Sentencing.

After Mr. Toledo-Flores's plea of guilty, the district court ordered that a presentence report ("PSR") be prepared to assist the court in sentencing Mr. Toledo-Flores. (R 1: 12) The Probation

Office began with a base offense level of eight, see PSR, ¶ 9, and then enhanced that base offense level eight levels pursuant to USSG § 2L1.2(b)(1)(C), on the ground that Mr. Toledo-Flores's 2002 Texas felony conviction for simple possession of 0.16 grams of cocaine[3] was an "aggravated felony." See PSR, ¶ 10. As a consequence, Mr. Toledo-Flores had an adjusted offense level of sixteen, see PSR, ¶ 14, and, after a three-level reduction for acceptance of responsibility, see PSR, ¶ 15, a total offense level of thirteen. See PSR, ¶ 16. With Mr. Toledo-Flores's Criminal History Category of VI, see PSR, ¶ 30, this produced a Guideline imprisonment range of thirty-three to forty-one months. See PSR, ¶ 49. However, because this range exceeded the two-year maximum authorized by 8 U.S.C. § 1325, the Guidelines range became the two-year (twenty-four month) maximum. See PSR, ¶¶ 48-49.

Mr. Toledo-Flores objected to the PSR's characterization of his 2002 simple possession conviction as an "aggravated felony." See Defendant's Response to the Presentence Report, at 1-2; see also PSR Addendum, at 14A. He renewed that objection at the sentencing hearing. (R 3: 5) The district court, however, overruled the objection and sentenced Mr. Toledo-Flores to twenty-four months' imprisonment. (R 3: 5)

3. The Appeal.

On appeal, Mr. Toledo-Flores renewed his argument that "his Texas state conviction for possession of cocaine is not a

[3] This conviction is set forth at paragraph 24 of the PSR.

qualifying aggravated felony because it is not a felony under the federal Controlled Substances Act." Toledo-Flores, No. 04-41378, slip op. at 1-2, 2005 WL 1995615, at *1. The Fifth Circuit, however, rejected this contention on the basis of its long-standing precedent:

> Our precedent is clear that Congress has made a "deliberate policy decision to include as an 'aggravated felony' a drug crime that is a felony under state law but only a misdemeanor under the [Controlled Substances Act]." United States v. Hernandez-Avalos, 251 F.3d 505, 510 (5th Cir. 2001) (internal quotation marks and citation omitted). A prior conviction for a state drug offense will qualify as an aggravated felony under U.S.S.G. § 2L1.2(b)(1)(C) if it is punishable under the Controlled Substances Act and it is punishable by more than a year of imprisonment under the applicable state law. See United States v. Sanchez-Villalobos, 412 F.3d 572, 576 (5th Cir. 2005). Toledo's prior offense meet this definition. See 21 U.S.C. § 844(a); TEX. HEALTH AND SAFETY CODE ANN. §§ 481.102(3)(D) & 481.115 (Vernon 2001); TEX. PENAL CODE ANN. § 12.35(a) (Vernon 2001). Accordingly, the judgment of the district court is AFFIRMED.

Toledo-Flores, No. 04-41378, slip op. at 2, 2005 WL 1995615, at *1.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

This case was brought as a federal criminal prosecution under 8 U.S.C. § 1325. The district court therefore had jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to resolve the circuit split as to whether a state felony conviction for simple possession of a controlled substance is a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) and hence an "aggravated felony," under 8 U.S.C. § 1101(a)(43)(B), even though the same crime is a misdemeanor under federal law.

A. Introduction.

Under 8 U.S.C. § 1101(a)(43), "[t]he term 'aggravated felony' means - (B) illicit trafficking in a controlled substance (as defined in [21 U.S.C. § 802], including a drug trafficking crime (as defined in [18 U.S.C. § 924(c)]) . . . ." 8 U.S.C. § 1101(a)(43)(B). And, under 18 U.S.C. § 924(c), "the term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.), the Controlled Substances Export Act (21 U.S.C. § 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." 18 U.S.C. § 924(c)(2).

The question is whether, in order to count as a "drug trafficking crime" and thus an aggravated felony, a crime must be classified as a felony under the named federal statutes; or whether, on the other hand, it is sufficient that: (1) the crime is punishable under the named federal statutes (whether as a felony or as a misdemeanor); and (2) that it is punishable as a felony in the jurisdiction in which the conviction actually occurred. In the instant case, the Fifth Circuit, holding that its "precedent [was] clear" on the question, applied the latter approach. This body of

precedent grew out of the Fifth Circuit's first decision on this question, United States v. Hinojosa-Lopez, 130 F.3d 691 (5th Cir. 1997), in which the Fifth Circuit held that a state felony conviction for simple possession of a controlled substance was a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) and thus an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(B), notwithstanding the fact that the same simple possession crime would be only a misdemeanor under federal law. See Hinojosa-Lopez, 130 F.3d at 693-94.

Presented in the context of this case, the question is whether Mr. Toledo-Flores's 2002 Texas state felony conviction for simple possession of 0.16 grams of cocaine - a misdemeanor under federal law - should nonetheless qualify as an "aggravated felony" because it was classified as a felony under Texas state law. As will be demonstrated, the circuits are divided on this question, and the Board of Immigration Appeals has furthered the disparity created by the circuit split by simply deferring to the view of the particular circuit in which the immigration proceedings occur. Furthermore, the majority rule is in tension with the general rule - enunciated by this Court in Jerome v. United States, 318 U.S. 101 (1943) - that federal criminal statutes should not be construed so as to make their application dependent upon the vagaries of the laws of the various states.

B. The Circuits Are Divided.

"The issue presented is whether a state conviction for possession [of a controlled substance] can ultimately qualify as an aggravated felony . . . if it is a felony under the applicable state law but is punishable only as a misdemeanor under the Controlled Substances Act (CSA), 21 U.S.C. § 801 et seq." United States v. Wilson, 316 F.3d 506, 512 (4th Cir.), cert. denied, 123 S. Ct. 1959 (2003). The Fifth Circuit, following its precedent,[4] answered that question in the affirmative in this case. The First, Fourth, Eighth, Tenth, and Eleventh Circuits have, in various decisions, agreed with the Fifth Circuit.[5]

The Second, Third, Ninth, and most recently the Sixth, Circuits have, however, reached a contrary result. In Aguirre v. INS, 79 F.3d 315, 317-18 (2d Cir. 1996), the Second Circuit, in the interest of the uniform national application of immigration law, abandoned its prior precedent in Jenkins v. INS, 32 F.3d 11 (2d Cir. 1994), and held that the petitioner's prior state felony conviction for possession of a controlled substance should not be considered a "drug trafficking crime" under 18 U.S.C. § 924(c) or

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[4] See, e.g., United States v. Rivera, 265 F.3d 310, 312-13 (5th Cir. 2001), cert. denied, 534 U.S. 1146 (2002); United States v. Hernandez-Avalos, 251 F.3d 505, 508 (5th Cir.), cert. denied, 534 U.S. 935 (2001); Hinojosa-Lopez, 130 F.3d at 693-94.

[5] See Wilson, 316 F.3d at 512, 514 (4th Cir.); United States v. Simon, 168 F.3d 1271, 1272 (11th Cir.), cert. denied, 528 U.S. 844 (1999); United States v. Briones-Mata, 116 F.3d 308, 309 (8th Cir. 1997); United States v. Cabrera-Sosa, 81 F.3d 998, 1000 (10th Cir.), cert. denied, 519 U.S. 885 (1996); United States v. Restrepo-Aguilar, 74 F.3d 361, 364 (1st Cir. 1996).

an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(B). The Third Circuit agreed and held that "a state felony drug conviction without a trafficking element constitutes an 'aggravated felony' under the [Immigration and Nationality Act] only when that same crime would be punished as a felony were the alien prosecuted in federal court . . . ." Gerbier v. Holmes, 280 F.3d 297, 300 (3d Cir. 2002); see also id. at 302-12.[6]

More recently, the Ninth Circuit has held that "a state drug offense is an aggravated felony for immigration purposes only if it would be punishable as a felony under federal drug laws or the crime contains a trafficking element." Cazarez-Gutierrez v. Ashcroft, 382 F.3d 905, 912 (9th Cir. 2004); see also id. at 910-18. The Ninth Circuit found this result compelled by "[t]he presumption that immigration laws should be interpreted to be nationally uniform, evidence that Congress intended uniformity, and prudential concerns." Id. at 912; see also id. at 912-18. The Ninth Circuit thus found that "because Cazarez-Gutierrez's offense, possession of methamphetamine,[7] is not punishable as a felony under federal law and involves no trafficking element, the BIA erred in concluding that Cazarez-Gutierrez is statutorily

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[6] The Third Circuit has labeled this the "hypothetical federal felony" approach. See id. at 304 (citing United States v. Graham, 169 F.3d 787, 789 (3d Cir.), cert. denied, 528 U.S. 845 (1999)).

[7] Much like the situation presented in this case, "[i]n January 1997, Casarez-Gutierrez was convicted by the State of Arizona of possession of methamphetamine, a felony under Arizona law . . . [but] not a felony under federal law." Id. at 908 (citations omitted).

ineligible for cancellation of removal because of an aggravated felony conviction." Id. at 918.

Most recently, in United States v. Palacios-Suarez, 418 F.3d 692 (6th Cir. 2005), the Sixth Circuit examined this same question in the context of the application of the Federal Sentencing Guidelines in a criminal case. After a detailed analysis of the statutory language, the panel majority concluded that it "c[ould]not say that the plain meaning of the language of [18 U.S.C.] § 924(c)(2) supports one interpretation over another," and therefore resort to the legislative history was necessary. Id. at 698. After examining the legislative history, the panel majority "conclude[d] that the legislative history of [8 U.S.C.] § 1101(a)(43) confirms the interpretation that Congress did not intend for state felony convictions (not involving any element of drug trafficking) to qualify as an "aggravated felony" under § 1101(a)(43)(B) if the offense would be punishable only as a federal misdemeanor under the [federal Controlled Substances Act]." Id. at 700.

Judge Nelson concurred. See id. at 701-02 (Nelson, J., concurring). He agreed that the statutory language was ambiguous, but disagreed that the legislative history provided any clarification. See id. at 702 (Nelson, J., concurring). He would, instead, have reached the same result by application of the rule of lenity. See id. (Nelson, J., concurring).

The Second, Third, Ninth, and Sixth Circuits have thus interpreted the relevant statutes in complete opposition to the

interpretation given to those same statutes by the First, Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits. To be sure, Aguirre, Gerbier, and Cazarez-Gutierrez are immigration cases rather than criminal cases.[8] That, however, should make no difference to the analysis of the statutes involved. As the Fifth Circuit has rightly observed, there is no justification for "interpreting th[e relevant] statute differently based on [a] distinction between sentencing and immigration cases; it is, after all, the same words of the same phrase from the same statute that is being interpreted in each instance."[9] Hernandez-Avalos, 251 F.3d 505 at 509; accord

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[8] In fact, both the Second Circuit and the Ninth Circuit have issued contrary decisions ***on the same question of law*** in the criminal context. See United States v. Pornes-Garcia, 171 F.3d 142, 145 (2d Cir.), cert. denied, 528 U.S. 880 (1999); United States v. Ibarra-Galindo, 206 F.3d 1337, 1339 (9th Cir. 2000), cert. denied, 531 U.S. 1102 (2001); but see Ibarra-Galindo, 206 F.3d at 1341-45 (Canby, J., dissenting). The Third Circuit likewise appears to have left open the possibility that the question could be resolved differently in a criminal case. See Gerbier, 280 F.3d at 307.

[9] Moreover, the state of the law is such that there is as much division of opinion, and confusion, in the immigration context as in the criminal law context. The Board of Immigration Appeals ("BIA") had once also held that felony simple possession of a controlled substance was not a "drug trafficking crime," and hence not an "aggravated felony." See Matter of K-V-D-, Int. Dec. 3422, 1999 WL 1186808 (BIA Dec. 10, 1999) (en banc); Matter of L-G-, 21 I. & N. Dec. 89 [1995 WL 582051] (BIA 1995) (en banc). However, the BIA subsequently issued an opinion abjuring its own independent interpretation of the statutes at issue here and decreeing that, henceforth, immigration courts should simply follow the law of the circuit in which the immigration proceeding is being held, or, if that circuit has not ruled, then the majority view. See Matter of Yañez-Garcia, 23 I. & N. Dec. 390, 396-98 [2002 WL 993589] (BIA 2002) (en banc); but see id. at 402-18 (Rosenberg and Espenoza, Board Members, concurring in part and dissenting in part). The BIA's decision in Yañez-Garcia thus multiplies the disparities arising from the division in the federal circuits.

Palacios-Suarez, 418 F.3d at 697 ("agree[ing] with the Fifth Circuit's reasoning [in Hernandez-Avalos] and declin[ing] to adopt separate interpretations of the same phrase for the immigration and sentencing cases"); see also Leocal v. Ashcroft, 125 S. Ct. 377, 383 n.8 (2004) (declining to interpret 18 U.S.C. § 16 differently in the immigration context than in the criminal law context "because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context . . . .").

This division in the federal circuits is, by itself, reason enough for this Court to grant certiorari. See Sup. Ct. R. 10(a). Because "[t]he statutory point is [at least] fairly debatable," Aguirre, 79 F.3d at 317, and because there are good and compelling reasons to adopt a view contrary to that taken by the Fifth Circuit in this case, see, e.g., Palacios-Suarez, 418 F.3d at 697-700 (majority opinion) & 701-02 (Nelson, J., concurring); Cazarez-Gutierrez, 382 F.3d at 910-18; Gerbier, 280 F.3d at 302-12; Ibarra-Galindo, 206 F.3d at 1341-45 (Canby, J., dissenting), this Court should grant certiorari in this case to decide this question.

C. The Majority Rule Is in Tension with this Court's Decision in *Jerome v. United States*, 318 U.S. 101 (1943).

There is, however, an additional reason why this Court should grant certiorari in this case, namely: that the majority rule is in tension with this Court's decision in Jerome v. United States, 318 U.S. 101 (1943). At issue in Jerome was the portion of the Bank Robbery Act providing that it was a crime to "enter or attempt

to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building or part thereof, so used, any felony or larceny . . . ." See Jerome, 318 U.S. at 101. The particular question was whether the utterance of a forged security - a felony under Vermont law, but not under any federal statute - could qualify as the "any felony" under this statute. See id. at 102.

This Court held that the term "any felony" did not incorporate felonies under state law. See id. at 104, 108. Of importance to this case, the Court noted that it "must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law." Id. at 104; see also United States v. Turley, 352 U.S. 407, 411 (1957) ("[I]n the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law.") (citing Jerome, 318 U.S. at 104; other citation omitted). The Court noted the "desirability of uniformity in application which supports the general principle." Jerome, 318 U.S. at 104.

Under the principles expressed in Jerome, there should be a presumption ***against*** making a simple possession offense an aggravated felony (or not) based solely upon how the offense is characterized in the particular state/jurisdiction in which the conviction occurred. In light of Jerome, it makes far more sense to hold that state law offenses are included only if they are

felonies under the referenced federal acts. Such a construction - i.e., the "hypothetical federal felony" approach, see Gerbier, 280 F.3d at 304 (citation omitted) - has the virtue of assuring the "uniformity in application" found to be "desirab[le]" in Jerome. In other words, a particular type of offense will always be counted (or not) irrespective of whether it is characterized as a felony or a misdemeanor by the jurisdiction in which the conviction occurred.

D. This Court Should Grant Certiorari in This Case.

The federal circuits are deeply divided on this important and recurring question of federal law. Moreover, the view espoused by petitioner here is supported by extremely strong reasoning. See, e.g., Palacios-Suarez, 418 F.3d at 697-700 (majority opinion) & 701-02 (Nelson, J., concurring); Cazarez-Gutierrez, 382 F.3d at 910-18; Ibarra-Galindo, 206 F.3d at 1341-45 (Canby, J., dissenting). By now, most of the federal circuits have weighed in on the question; therefore, further "percolation" would not materially advance this Court's ability to assess the merits of this question. Finally, this question is an extremely important one that courts confront daily, both in the criminal law context and in the immigration law context. For these reasons, this Court should grant certiorari in this case to decide this question.

CONCLUSION

For the foregoing reasons, the petitioner, Reymundo Toledo-Flores, respectfully prays that this Court grant certiorari to review the judgment of the Fifth Circuit.

Date:
November 15, 2005

Respectfully submitted,

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Southern District of Texas
Attorney of Record

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United States Court of Appeals
Fifth Circuit
FILED
August 17, 2005
Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-41378
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

REYMUNDO TOLEDO-FLORES,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:04-CR-546-ALL

Before BENAVIDES, CLEMENT, and PRADO, Circuit Judges.

PER CURIAM:*

Reymundo Toledo-Flores (Toledo) appeals the two-year sentence imposed following his guilty-plea conviction for improper entry by an alien. Toledo argues that the district court erred by imposing the eight-level increase in U.S.S.G. § 2L1.2(b)(1)(C) (2003) for having a prior aggravated felony conviction. Toledo contends that his Texas state conviction for possession of cocaine is not a qualifying aggravated felony because it is not a felony under the federal Controlled

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX A

Substances Act. Although Toledo conceded before the district court that this argument was foreclosed by United States v. Rivera, 265 F.3d 310 (5th Cir. 2001), and United States v. Hinojosa-Lopez, 130 F.3d 691 (5th Cir. 1997), on appeal he asserts that these decisions are not binding because they conflict with Jerome v. United States, 318 U.S. 101 (1943).

Our precedent is clear that Congress has made a "deliberate policy decision to include as an 'aggravated felony' a drug crime that is a felony under state law but only a misdemeanor under the [Controlled Substances Act]." United States v. Hernandez-Avalos, 251 F.3d 505, 510 (5th Cir. 2001) (internal quotation marks and citation omitted). A prior conviction for a state drug offense will qualify as an aggravated felony under U.S.S.G. § 2L1.2(b)(1)(C) if it is punishable under the Controlled Substances Act and it is punishable by more than a year of imprisonment under the applicable state law. See United States v. Sanchez-Villalobos, 412 F.3d 572, 576 (5th Cir. 2005). Toledo's prior offense meets this definition. See 21 U.S.C. § 844(a) (2003); TEX. HEALTH AND SAFETY CODE ANN. §§ 481.102(3)(D) & 481.115 (Vernon 2001); TEX. PENAL CODE ANN. § 12.35(a) (Vernon 2001). Accordingly, the judgment of the district court is AFFIRMED.

AO [illegible] Judgment in a Criminal Case
United States District Court
Southern District of Texas
FILED
SEP 10 2004
Michael N. Milby, Clerk
Laredo Division

United States District Court
Southern District of Texas
ENTERED
SEP 17 2004
Michael N. Milby Clerk
Laredo Division

UNITED STATES DISTRICT COURT

Southern District of Texas

Holding Session in Laredo

UNITED STATES OF AMERICA

V.

REYMUNDO TOLEDO-FLORES

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: **5:04CR00546-001**

USM NUMBER: 35331-179

Raul Martinez
Defendant's Attorney

☐ See Additional Aliases.

THE DEFENDANT:

☒ pleaded guilty to count(s) one on May 3, 2004

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
8 U.S.C. § 1325	Illegal entry (felony)	02/22/2004	One

☐ See Additional Counts of Conviction.

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

September 9, 2004
Date of Imposition of Judgment

George P. Kazen
Signature of Judge

GEORGE P. KAZEN
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

9/10/04
Date

QIC/PEN/rf

APPENDIX B

DEFENDANT: **REYMUNDO TOLEDO-FLORES**
CASE NUMBER: **5:04CR00546-001**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 24 months.

The defendant was advised of the right to appeal the sentence, including the right to appeal in forma pauperis, upon proper documentation.

☐ See Additional Imprisonment Terms.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **REYMUNDO TOLEDO-FLORES**
CASE NUMBER: **5:04CR00546-001**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 1 year.

☐ See Additional Supervised Release Terms

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court. *(for offenses committed on or after September 13, 1994)*

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

☒ See Special Conditions of Supervision.

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **REYMUNDO TOLEDO-FLORES**
CASE NUMBER: **5:04CR00546-001**

SPECIAL CONDITIONS OF SUPERVISION

If deported, the defendant is not to re-enter the United States illegally. If the defendant is deported during the period of probation or the supervised release term, supervision by the probation office becomes inactive. If the defendant returns, the defendant shall report to the nearest U.S. Probation Office immediately. Supervision by the probation officer reactivates automatically upon the defendant's reporting.

DEFENDANT: **REYMUNDO TOLEDO-FLORES**
CASE NUMBER: **5:04CR00546-001**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00		

☐ See Additional Terms for Criminal Monetary Penalties.

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

☐ See Additional Restitution Payees.

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

☐ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

18

DEFENDANT: **REYMUNDO TOLEDO-FLORES**
CASE NUMBER: **5:04CR00546-001**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☒ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or
☒ in accordance with ☐C, ☐ D, ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ installments of $ _____ over a period of_____ , to commence _____ days after the date of this judgment; or

D ☐ Payment in equal _____ installments of $ _____ over a period of_____ , to commence _____ days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:
Make all payments payable to: U.S. District Clerk, P.O. Box 597, Laredo, TX 78042-0597

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ See Additional Defendants and Co-Defendants Held Joint and Several.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

☐ See Additional Forfeited Property.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.